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Report of the Expert Meeting on Competition Law and Policy

held at the Palais des Nations, Geneva,
from 24 to 26 November 1997

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INTRODUCTION

1. The Expert Meeting on Competition Law and Policy met at the Palais des Nations, Geneva, from 24 to 26 November 1997. In the course of its session, it held 2 plenary meetings and 6 informal meetings.

Opening statements

2. The **Vice-Chairman of the 1996 Expert Meeting**, in his introductory statement, commended UNCTAD's activities in the field of competition law and policy and recalled the successful discussions of the High-Level Segment of the Trade and Development Board on "Globalization, Competition, Competitiveness and Development", as well as the interesting debate on the need for competition policy in countries that liberalize foreign direct investment (FDI), which took place during the third session of the Commission on Investment, Technology and Related Financial Issues.

3. The **Secretary-General of UNCTAD**, in his opening statement, recalled that, this year, competition policy had been high on the agenda of UNCTAD's policy-making machinery. The High-Level Segment of the Trade and Development Board (UNCTAD's highest body at the Ministerial level), devoted its attention to the subject of "Globalization, Competition, Competitiveness and Development", during which the Ministers participated in a debate aimed at identifying ways and means of improving competitiveness and accelerating economic growth more efficiently through exposure to competition.

4. During the second session of UNCTAD's Commission on Investment, Technology and Related Financial Issues, a debate took place on the theme: "The more FDI policy is liberalized, the more important competition policy becomes", which was analysed in the *World Investment Report, 1997*. In its agreed recommendations, the Commission called for work to elucidate the elements of appropriate competition policy and the benefits that can be gained from it, and on how to achieve coherence between foreign direct investment (FDI) liberalization, trade policy and competition policy. It also recommended study of the experiences gained so far with international cooperation on competition policy issues and the mechanisms used, and the impact of competition policy on the inflows of FDI and on the overall growth of the domestic economy. Finally, it highlighted the need to increase the understanding of the interrelationship between FDI liberalization and competition policy, in cooperation with the World Trade Organization (WTO). The Secretary-General noted that the Commission on Investment, Technology and Related Financial Issues was a policy-making body, and that, in consequence, the Expert Group should aim at identifying policy issues for consideration by the Commission.

5. He also recalled that in December 1996, the Singapore WTO Ministerial Meeting decided to set up a WTO Working Group on the Interaction between Trade and Competition Policy which "should draw upon and be without prejudice to the work in UNCTAD and other appropriate intergovernmental fora". The Singapore Declaration welcomed UNCTAD's work as provided for in the Midrand Declaration

and the contribution it could make to the understanding of issues, and encouraged cooperation between the WTO and UNCTAD. As a consequence, the UNCTAD secretariat had participated in the WTO Working Group in an observer capacity, and the Working Group's third session was being held back-to-back with UNCTAD's Expert Meeting. Moreover, the WTO secretariat, in collaboration with the secretariats of UNCTAD and World Bank would be holding a Symposium on "Competition Policy, Economic Development and International Trade", to which eminent panellists and experts from competition authorities in their personal capacity would participate. There was an enormous need for technical cooperation for developing countries, as well as economies in transition, and UNCTAD's plans for 1998 covered all regions of the world, with special emphasis on Africa. He noted that the issue of mobilizing resources for technical assistance was of major concern to UNCTAD, and invited the experts to make suggestions on how to mobilize financial support for technical assistance in this field and identify how the experts could raise this issue with potential donors.

6. Placing the Expert Meeting in a broader context, he noted that, as the world moved more and more towards a global economy, the subject of competition had evolved to the central stage, because it was at the very essence of the good functioning of the market economy. Hence, the task before national governments and the international community to make the world economy a more competitive one, both nationally and internationally, was considerable. This was why he attached great importance to the UNCTAD annual meeting of Experts on Competition Law and Policy as the only forum in the world where all competition authorities, as well as representatives of governments which do not have competition law, could make their views known and exchange information and experiences on specific competition issues.

Chapter I

CONSULTATIONS ON COMPETITION LAW AND POLICY, INCLUDING THE MODEL LAW AND STUDIES RELATED TO THE PROVISIONS OF THE SET OF PRINCIPLES AND RULES

WORK PROGRAMME, INCLUDING TECHNICAL ASSISTANCE, ADVISORY AND TRAINING PROGRAMMES ON COMPETITION LAW AND POLICY

(Agenda item 3)

7. For its consideration of this agenda item, the Expert Meeting had before it the following documentation:

"Empirical evidence of the benefits from applying competition law and policy principles to economic development in order to attain greater efficiency in international trade and development: Report by the UNCTAD secretariat" (TD/B/COM.2/EM/10)

"Review of technical assistance, advisory and training programmes on competition law and policy: Note by the UNCTAD secretariat" (TD/B/COM.2/EM/9).

8. The representative of **Tunisia** highlighted recent developments concerning his country's competition law and policy, since the last meeting of experts in October 1996. Like many other developing countries, Tunisia had strengthened its market mechanism by opening the economy and by concretizing a free-trade zone with the European Union. Technical cooperation with competition authorities in other countries had been strengthened in order to bring his country in line with the necessities of the world economy. In this connection the work of UNCTAD's expert Meeting was considered of major importance, as it provided the opportunity for a growing number of new competition authorities of developing countries to exchange experiences among themselves and with developed countries. This ensured a certain convergence of the rules which were being enforced. However, in spite of undeniable progress in this field, the capacity of competition authorities in developing countries remained limited, especially with respect to restrictive practices of international dimension. Hence the need for strengthening cooperation for exchange of information among competition authorities and the need for reliable databases on restrictive business practices. There were still many countries in Africa where competition legislation was non-existent. Tunisia's competition authority stood ready to support the organization of regional workshops aimed at promoting the adoption and enforcement of competition rules by all countries of the region.

9. The representative of **Japan** emphasized the need to look into the interrelationship between trade and competition laws and policies. Both sets of laws and policies, he argued, have a common central objective, namely to maximize economic welfare by improving resource allocation. He drew attention to the positive and negative interactions between them. On the positive side, when a firm conducts anticompetitive action in order to expel foreign

competitors, competition laws, such as antimonopoly law, can restrict such behaviour, and thus promote trading. On the negative side, some trade laws, such as the Antidumping Agreement of the WTO, could serve to protect domestic firms from unfair pricing and were often taken as a justification for economically inefficient measures. Moreover, trade measures could be used intentionally in an anticompetitive manner: antidumping measures could be used as a means of realizing cooperative price setting by domestic and foreign firms, or in order to monopolize the domestic market. He further drew attention to possible negative effects of competition laws on trade laws: (i) the extraterritorial application of domestic competition laws to protect a domestic firm may not only infringe the sovereignty of a foreign country, but also distort competition between the two countries; (ii) the exemption clauses of competition laws could have the effect of protecting inefficient domestic industry and distorting trade. Little had been done thus far to incorporate the competition perspective into international trade rules, even though the importance of competition has become greater as the world trade system has been liberalized. There was thus a need to examine the interaction between trade and competition laws. Finally he stressed that the specific situation of developing countries should be taken into account when formulating competition laws.

10. The representative of **Kenya** informed the meeting about recent developments with respect to the application of competition law and policy in her country. Eight years after the enactment of the national competition law (The Restrictive Trade Practices, Monopolies and Price Control Act), the National Assembly was currently examining a comprehensive list of amendments to the existing competition legislation in order to make it more effective. In order to strengthen the technical expertise of the officials involved in the delicate task of properly enforcing the law, the Kenyan competition authority was also organizing, in cooperation with UNCTAD, a training seminar to be held in mid-January for competition authority officials. In view of the growing interest with respect to competition law and policy among African countries, participants from other countries were being invited to attend.

11. The representative of the **Russian Federation** called attention to radical economic reforms under way in his country, other countries of the former USSR, Eastern Europe and many developing countries, with the development of competition and entrepreneurship being one of the main elements of these reforms. Following the creation of the Antimonopoly Committee seven years ago, an appropriate legal framework had been established in the field of antimonopoly regulation and related areas, including elimination of unfair competition, advertising, protection of consumer rights and support of small-scale entrepreneurship. Taking into account the accumulated experience of antimonopoly regulation in Russian Federation and other countries, as well as the dynamic changes taking place in the Russian economy, in 1995 mostly all articles of the "Law on competition and limitation of monopolistic activity on commodity markets" had been substantially revised. As a result, the present Russian antimonopoly legislation was generally consistent with international standards and contained all major elements of antimonopoly supervision in the areas of the control of cartel agreements, abuse of dominant position in the market, concentration of market power and unfair competition, including illicit utilization of intellectual and industrial

property. The Committee had also elaborated legislation which was applicable in the fields of protection of consumer rights, monitoring misleading advertising and monopoly practices related to natural monopolies. Taking into account the continuing integration of the Russian Federation into the world economy and the required conditions of its entering into WTO, one of the main tasks of the Committee consisted of elaborating a well-balanced economic policy, which provided for a combination of measures directed at opening up Russian markets for foreign competition with measures of protecting national producers and the interests of consumers. Special attention was also devoted to the transparency of the antimonopoly legislation through various means of provision of relevant information with a view to achieving a proper understanding of the legislation by entrepreneurs, foreign investors and consumers. By means of promoting competition, the activities of the Committee had been designed to ensure and increase economic efficiency and consumer welfare. Finally, he pointed to the positive experience accumulated by Russian Federation in cooperation with UNCTAD within the framework of the Expert Group on Competition Law and Policy, which, so far, had not been adequately supplemented by technical assistance in the area of competition policy and legislation. He expressed the hope that cooperation with UNCTAD would be further developed as it contributed to the harmonization of Russian legislation with international standards and norms and to the exchange of information and opinions on different important aspects of competition law and policy.

12. The representative of the **European Community** (EC) stressed the important role the European Community attaches to the adoption and enforcement of competition legislation for the promotion of economic efficiency as well as for the achievement of trade liberalization. The WTO Ministerial meeting held in Singapore recognized the EC stance and set up a working group to study the interaction between trade and competition policy. This working group was already achieving substantial progress and has started focusing on substantial issues. He noted that UNCTAD had an important role to play, and stressed the importance of a full collaboration between WTO and UNCTAD. He stressed the fact that it was within UNCTAD that the only multilateral code on competition policy had been agreed upon. In view of the increasing economic integration on a global scale, it was important to make such multilateral rules more binding in nature. The EC delegate also noted the important contribution provided in this year's edition of the *World Investment Report, 1997*, which examines in great detail the international aspects of competition policy, and in particular the relationship between foreign direct investment liberalization and competition policy.

13. The representative of **Turkey** said that the issues relating to competition policy have gained more importance than ever because of the increasing globalization and liberalization of the world economy. She also said that in contrast to the reduction of tariff barriers non-tariff and other restrictive business practices (RBPs) have been widely implemented in international trade. She added that the establishment of an effective competitive environment is essential for a balanced allocation of resources and maximizing welfare. At the international level, a well-functioning multilateral trading system would require cooperation among national competition authorities in order to fend off restrictive business practices.

She noted that the Singapore Ministerial Declaration is strong evidence of this multilateral approach and said that she believed that WTO, with its broad membership, could serve as one of the most appropriate forums to achieve the goals of combating anticompetitive practices and their trade-distorting effects. She added that success in the work within the WTO Working Group on the Interrelationship between trade and Competition Policy would depend on setting up a common basis for different aspects of national competition laws and policies. In this connection, the work of UNCTAD and OECD on competition would enhance the work under way in the WTO. Turning to the development dimension, she said that the establishment of an effective competitive environment could encourage the flow of investment and give impetus to economic development. She was of the view that UNCTAD could make a remarkable contribution to those countries that have not yet established, or are in the process of establishing, their national competition law.

14. The representative of **Egypt** stated that Egypt was in the process of adopting a full-fledged competition legislation. The new competition law, which would be adopted soon, would apply across the board to all anticompetitive practices. The government would then be faced with the difficult task of training the officials charged with enforcing the new law. In this respect, a national seminar was to be held shortly in Cairo with the assistance of UNCTAD.

15. The representative of **Ecuador** stressed the importance of competition policy. In this context, he noted that work was being launched in his country, with the assistance of UNCTAD, for drawing the parameters of a competition law and of a competition authority which would not add to existing bureaucracy, but would function effectively and increase economic efficiency in his country.

16. The representative of the **United States of America** noted that in the opening plenary, the representative of Japan expressed the view that this Expert Meeting should take up the issue of the "interrelationship between trade and competition laws and policies". As is well known, during the 17 years since the adoption of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices by the United Nations General Assembly in 1980, the United States has consistently taken the view that trade law and policy is not a subject within the scope of the Set, and thus can form no part of the work of the Expert Meeting. That remains our view.

17. The representative of the **International Chamber of Commerce** said his organization greatly appreciated this opportunity to contribute to UNCTAD'S work in the area of competition policy. In a period when economic transactions were becoming increasingly international, the ICC believed that it was important for discussions on competition policy to take place at an international level in forums such as UNCTAD.

18. The ICC was presently working to bring together the views of the business community at the international level on issues such as cooperation between competition authorities, convergence of competition systems and linkages between competition and trade. A report on competition and trade is

to be finalized in 1998. In this connection, the ICC would organize a consultative forum on competition and trade on 21 February in Paris to which UNCTAD would be invited.

Chapter II

ACTION BY THE EXPERT MEETING

19. At its 2nd (closing) plenary meeting, on 26 November 1997, the Expert Meeting adopted its draft agreed conclusions (see annex I below).

20. The meeting agreed that a Chairman's summary of the informal discussions would be prepared with the assistance of the secretariat. The summary would be brief and factual and prepared under the sole responsibility of the Chairman. It would be incorporated into the final report of the meeting (see annex II below).

Chapter III

ORGANIZATIONAL MATTERS

A. Opening of the session

21. The session was opened on Monday, 24 November 1997, by Mr. F. Souty (France), Vice-Chairperson of the Expert Meeting on Competition Law and Policy.

B. Election of officers

(Agenda item 1)

22. At its opening plenary meeting, on Monday, 24 November 1997, the Expert Meeting on Competition Law and Policy elected its officers, as follows:

Chairperson:	Mr. George K. Lipimile (Zambia)
Vice-Chairperson-cum-Rapporteur:	Mr. Federico Alberto Cuello (Dominican Republic)

C. Status of the Meeting

23. The Expert Meeting was informed that it had been convened in accordance with a decision taken by the Commission on Investment, Technology and Related Financial Issues at its first session. At that time, it had been referred to as the Expert Meeting on Competition Law and Policy. However, member States of UNCTAD had recently agreed that: (i) the intergovernmental Group of Experts on Restrictive Business Practices would retain its intergovernmental character and status and, in principle, meet on an annual basis; (ii) it would operate within the framework of the Commission on Investment, Technology and Related Financial Issues, to which it would report. In addition, the Trade and Development Board had recommended to the General Assembly to change the title of the Intergovernmental Group of Experts on Restrictive Business Practices to that of the Intergovernmental Group of Experts on Competition Law and Policy. As the General Assembly had not yet taken a final decision in this respect, it was agreed that the Meeting continue to be called the Expert Meeting on Competition Law and Policy but that it should be conducted in the manner of an Intergovernmental Group of Experts.

D. Adoption of the agenda and organization of work

(Agenda item 2)

24. Also at the opening plenary meeting, the Expert Meeting on Competition Law and Policy adopted the provisional agenda for the session (TD/B/COM.2/EM/8). The agenda was thus as follows:

1. Election of officers

2. Adoption of the agenda and organization of work

3. (i) Consultations on competition law and policy, including the Model Law and studies related to the provisions of the Set of Principles and Rules

   (ii) Work programme, including technical assistance, advisory and training programmes on competition law and policy

4. Adoption of the report of the Meeting

E. Provisional agenda for the next session of the Intergovernmental Group of Experts on Competition Law and Policy

25. At its closing plenary meeting on 26 November 1997, the Expert Meeting approved the provisional agenda for the next session of the Intergovernmental Group of Experts on Competition Law and Policy. The provisional agenda is thus as follows:

1. Election of officers

2. Adoption of the agenda and organization of work

3. (i) Consultations on competition law and policy, including the Model Law and studies related to the provisions of the Set of Principles and Rules

   (ii) Work programe, including technical assistance, advisory and training programmes on competition law and policy

4. Provisional agenda for the next session of the Intergovernmental Group of Experts

5. Adoption of the report of the Meeting

F. Adoption of the report of the Meeting

26. At its 2nd (closing) plenary meeting, on 26 November 1997, the Expert Meeting adopted the draft report on its session (TD/B/COM.2/EM/L.3), subject to any amendments that delegations might wish to make, and authorized the Rapporteur to complete the final report of the Expert Meeting as appropriate.

Annex I

AGREED CONCLUSIONS

The Expert Meeting on Competition Law and Policy, meeting in Geneva from 24 - 26 November 1997,

Recalling the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices and the Third United Nations Conference to Review all Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices,

Taking note of the agreed recommendations adopted by the Commission on Investment, Technology and Related Financial Issues at its second session,

Taking further note of the Singapore Ministerial Declaration of December 1996 which agreed that the WTO Working Group on the Interaction between Trade and Competition Policy should draw upon, and be without prejudice to, the work in UNCTAD and, in particular, its contribution to the understanding of issues and to ensuring that the development dimension is taken fully into account,

Taking note also with appreciation of the documentation prepared by the UNCTAD secretariat for the present Meeting,

1. Urges continued cooperation between UNCTAD and WTO in the area of competition law and policy;

2. Recommends that the consultations at the forthcoming meeting of the Intergovernmental Group of Experts on Competition Law and Policy should focus on the following topics:

(a) The principle of positive comity;

(b) Remedies and sanctions for antitrust violations;

(c) The treatment of abuse of dominance/monopolization analysis, including price discrimination, with special reference to cases affecting more than one country.

3. Invites States members on a voluntary basis to assist UNCTAD in its technical cooperation activities by providing experts, training facilities, and financial resources, and requests the UNCTAD secretariat to pursue its technical cooperation activities within available resources, in the light of the resolutions adopted by the Third Review Conference and UNCTAD IX, as well as the deliberations and consultations held during this Meeting;

4. Recognizes the importance of strengthened international cooperation in the area of competition law and policy;

5. Requests further the UNCTAD secretariat to prepare for consideration by the forthcoming meeting of the Intergovernmental Group of Experts on Competition Law and Policy:

(a) An updated review of technical assistance, taking into account the information to be submitted by States and international organizations no later than 31 January 1998;

(b) A revised version of the study on the empirical evidence of the benefits of competition policy (TD/B/COM.2/EM/10), taking into account comments made at the present Meeting and written information to be received by 31 January 1998;

(c) A preliminary report of a study on the experiences gained so far with international cooperation on competition policy issues and the mechanisms used, taking into account information to be received by 31 January 1998;

(d) To continue to publish the following documents on a regular basis and to make them available on the Internet:

(i) Further issues of the Handbook on Competition Legislation including regional and international instruments;

(ii) A revised version of the Commentary to the Model Law, taking into account new trends in merger control;

(iii) An updated version of the Directory of Competition Authorities; and

(iv) An information note relating to recent important competition cases, with special reference to competition cases involving more than one country, taking into account information to be received from member States.

Annex II

CHAIRMAN'S SUMMARY OF THE INFORMAL DISCUSSIONS

1. During the informal consultations three topics were thoroughly discussed. It is not possible to provide a full summary of the lively and rich consultations which took place; however among the issues highlighted were the following:

First topic: international aspects of competition and problems for competition law enforcement including international mergers and industrial concentration which affect other countries and the strengthening of international cooperation:

2. Issues discussed included:

(a) The existing international framework of competition cooperation agreements; comity and positive comity; the conditions necessary for extending and multilateralizing this framework;

(b) Restrictive business practices by transnational firms affecting developing countries;

(c) Asymmetry of information of developing countries (compared with developed countries) relating to restrictive business practices arising abroad affecting their markets;

(d) The relationship between the objectives and application of competition law and policy and those of trade measures, taking into account the relevant provisions of existing bilateral or regional agreements;

(e) The treatment of small and medium-sized firms under competition laws, including the extent to which there should be special rules to cover practices by such firms;

(f) The usefulness of the Set of Principles and Rules and the Model Law for promoting understanding and the convergence in the competition field.

The second topic discussed was non-price vertical restraints (selective distribution, exclusive dealing and franchising):

3. Issues discussed included:

(a) The complexity of vertical restraints which require thorough economic analysis to evaluate their effects on competition;

(b) The possibility of foreclosure of market entry or facilitation of collusive behavior by vertical restraints;

(c) The appropriateness for a case-by-case evaluation of vertical restraints;

(d) The similarity of the effects in the market of price and non-price vertical restraints;

(e) The need to look at the economic effects rather than simply focus on the specific contractual instrument employed;

(f) The possibility of foreclosure of market entry to both domestic and foreign firms;

(g) The need for a transparent and clear legal framework in this field.

The third topic was ways and means of promoting a competition culture and making transparent the benefits to be derived from competition policy:

4. The main issues discussed included:

(a) The long-term nature and magnitude of the efforts needed to change the collusive business culture prevalent under State intervention to a culture of competition;

(b) The need to create consumer awareness of the benefits of competition policy, and to obtain the cooperation of the media for this purpose;

(c) The importance of getting all economic actors to understand the task of the competition authority as that of defending and promoting competition rather than competitors;

(d) The independence of the competition authority from the Government, and the need for raising political awareness of the benefits of competition law and policy;

(e) The appropriateness of transparency and publicity in fulfilling the competition advocacy role of the competition authority.

Annex III

ATTENDANCE */

1. The following States members of UNCTAD were represented as experts at the meeting:

Algeria
Argentina
Australia
Azerbaijan
Bahrain
Belarus
Brazil
Bulgaria
Burkina Faso
Canada
Central African Republic
Chile
China
Colombia
Costa Rica
Côte d'Ivoire
Croatia
Cuba
Czech Republic
Dominican Republic
Ecuador
Egypt
Ethiopia
France
Georgia
Germany
Guatemala
Guinea
Hungary
India
Indonesia
Iran (Islamic Republic of)
Iraq
Italy
Japan
Jordan
Kenya
Libyan Arab Jamahiriya
Luxembourg
Madagascar
Malaysia
Malta
Mauritius
Mexico
Morocco
Myanmar
Nigeria
Pakistan
Philippines
Poland
Portugal
Republic of Korea
Romania
Russian Federation
Rwanda
Senegal
Singapore
Slovakia
Spain
Sri Lanka
Sudan
Sweden
Switzerland
Thailand
Tunisia
Turkey
United Kingdom of Great Britain and Northern Ireland
United States of America
Uruguay
Venezuela
Yemen
Zambia

The European Community was also represented.

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*/ For the list of participants, see TD/B/COM.2/EM/INF.2

2. The following international organization was represented at the meeting:

World Trade Organization

3. The following intergovernmental organizations were represented at the meeting:

Arab Labour Organization
Central African Customs and Economic Union
Latin American Economic System
Union of African Shippers' Councils

4. The following non-governmental organizations were represented at the meeting:

General Category:

Consumers International
International Chamber of Commerce
World Federation of United Nations Associations

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